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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DELBERT CHARLES STEELE, Defendant and Appellant.	E044836 (Super.Ct.No. SWF018144) OPINION

APPEAL from the Superior Court of Riverside County. James L. Quaschnick, (retired judge of the Fresno Super. Ct., assigned by the Chief Justice pursuant to art. VI, § 6, of the Cal. Const.) and Michael S. Hider (retired judge of the Merced Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.), Judges.[1]

Affirmed.

[1] Judge Quaschnick presided over the trial phase of this case; Judge Hider heard defendant's *Pitchess* motion.

Christopher Nalls, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, and Rhonda Cartwright-Ladendorf and Heather F. Crawford, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Following a jury trial, defendant Delbert Charles Steele was convicted of evading a peace officer by driving a motor vehicle with willful and wanton disregard for the safety of persons or property, a felony. (Veh. Code, § 2800.2.) He was sentenced to 36 months' probation and 180 days in jail. He appeals, contending the trial court abused its discretion in denying his *Pitchess*[2] motion without an in camera hearing, and the verdict was void because CALCRIM Nos. 226 (witnesses) and 302 (evaluating conflicting evidence) prejudicially misrepresented the prosecution's burden of proof and were unconstitutionally ambiguous. We reject defendant's contentions and affirm.

II. FACTS

A. Prosecution Evidence

On September 17, 2006, deputies from the Riverside County Sheriff's Department stopped traffic in both directions on Railroad Canyon Road in Canyon Lake to investigate a crash and clean up debris. The deputies were in full uniform and there were three

[2] *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).

marked patrol cars with light bars and a patrol motorcycle parked at the scene. Heavy traffic backed up in both directions.

Deputy Rene Quesada directed westbound traffic off the road and through a parking lot. His marked police car was parked across both lanes of westbound traffic. There were more than 50 cars waiting to be diverted.

Defendant, who was traveling westbound on Railroad Canyon Road, began to pass the stopped traffic at a high rate of speed in the number two lane. Sergeant David Barton noticed defendant and warned Deputy Quesada of the oncoming pickup truck. Sergeant Barton then began yelling for defendant to stop.

Deputy Quesada turned to see defendant driving toward the side of his patrol car and waved his arms, yelling, "[r]oad's closed" and "[s]low down." Deputy Quesada's car did not completely block the road; there was space to drive around it in the bicycle lane. Although defendant slowed, he passed Deputy Quesada's car at about 40 miles per hour. Deputy Quesada saw him say "[n]o," and Deputy Quintin Giallorenzo heard defendant say, "No. I'm not stopping. You are not the real cops."

Deputy Michael Clepper was standing near the center divider investigating the accident. Deputy Clepper yelled at defendant to stop and threw his pen at the truck, hitting the side and causing defendant to flinch. Deputy Clepper heard defendant say, "Fucking asshole," and defendant kept on driving through debris from the accident.

Deputies Quesada and Giallorenzo got into their patrol cars and chased defendant, using their lights and sirens. The deputies caught up with the truck, but defendant did not

yield. Defendant was driving around 70 or 75 miles per hour, changing lanes without signaling. Other cars slowed and pulled over to get out of the way.

When defendant stopped at a red light, Deputy Quesada stopped behind him. Following sheriff's department protocol, Deputy Quesada drew his gun and pointed it at defendant. Deputy Quesada saw defendant look in his side-view mirror and shake his head "no"; defendant then ran the red light. At one point, defendant made a U-turn, crossing a double yellow line. He made an obscene hand gesture at the deputies and yelled, "You are not the real cops. It's a federal conspiracy. I'm not stopping."

After driving about five and a half miles from the accident site, defendant pulled his car halfway onto the curb at the Lake Elsinore police station. He jumped out of his car, ran to the front doors of the station, and tried to go inside, but it was Sunday and the doors were locked. As the deputies approached him, defendant said, "You are not the police," and "I'm the watch commander."[3] The deputies ordered him to lie on the ground, and he complied.

B. Defense Evidence

Defendant testified that on September 17, 2006, he was driving on Railroad Canyon Road when he saw an accident up ahead and a line of 20 or 30 stopped cars. The stopped cars were all in the inside lane, and defendant thought he could go around them because the road was partly open. He saw a police car, but it was not blocking the

[3] Deputy Quesada heard defendant say, "I want to see your watch commander," which Deputy Quesada interpreted as a request to see his supervisor. Deputy Giallorenzo thought defendant was saying, "I'm the watch commander."

outside lane; he also saw four or five sheriff's deputies. He drove past the stopped cars in the outside lane, slowing down significantly to avoid damage to his truck from small pieces of debris in the road.

As defendant drove slowly over the debris, a deputy yelled, "'Hey,'" picked up some debris from the road, and threw it at defendant's truck. It hit the truck, and the deputy yelled, "'F you, A-hole'"; the deputy was noticeably upset. Defendant replied, "'Well, F you, too,'" and kept driving. Defendant swore at the deputy only because it seemed "highly inappropriate" for the deputy to throw something at his truck. No deputy told him to stop, and defendant thought the incident was over.

As soon as he saw police lights behind him, he pulled over into the bike lane. He looked in his side-view mirror and saw Deputy Quesada waving his gun and "leering" at him.[4] Defendant was "nervous" and decided to go somewhere safe. He drove away, planning to go to his friends at the airport, but then decided to go to the police station and made a U-turn. He made a brief call to 911 and drove to the Lake Elsinore police station because he thought someone there could help him.

Defendant admitted he would not stop for the deputies, and that he had made an illegal U-turn and had likely ran a red light. He did not say the deputies were not police or anything about a federal conspiracy.

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[4] Initially defendant testified that Deputy Giallorenzo pulled the gun on him, but later amended his testimony to clarify that he meant Deputy Quesada.

Defendant's truck is a 1988 four-cylinder Chevrolet S-10 with 1,200 to 1,500 pounds of added custom welding equipment and tool boxes. An investigator for the public defender's office met defendant about 10 months later to test his truck and determine its top speed. Sitting in the passenger seat, the investigator had defendant drive the truck as fast as he could over the chase route. The investigator occasionally looked over to see if defendant was pressing the gas pedal all the way to the floor. The investigator concluded the truck would go about 60 to 65 miles an hour, downhill, with the gas pedal floored.

Other facts are set forth in the discussion of the issues to which they pertain.

III. *PITCHESS* MOTION

Defendant argues the trial court abused its discretion when it denied his *Pitchess* motion without an in camera hearing because the motion demonstrated good cause and complied with the requirements of Evidence Code sections 1043 and 1046.

A. Factual and Procedural Background

On September 27, 2007, defendant filed a *Pitchess* motion for discovery of officer personnel files. He claimed the officers deliberately misrepresented and omitted material facts about the investigation and legal basis for detaining and arresting defendant. Defendant's motion laid out the officers' allegations that he had been "speeding, swerving in and out of lanes, driving through stop signs and red lights, driving into oncoming traffic, making unsafe lane changes and illegal U-turns, and generally driving in an erratic and unsafe manner."

In the supporting declaration, defendant's counsel stated the information sought would support three defenses to the charged crimes. First, defendant did not drive as the officers claimed. Second, defendant did not intend to evade arrest. He was harassed by the officers and feared for his safety, but he did not "resist, obstruct or delay" the officers when they pulled him over. Third, neither Deputy Quesada nor Deputy Giallorenzo was acting within the lawful scope of their duty at the time of the arrest. Defendant sought information on persons who were arrested by Sergeant Barton or Deputies Quesada, Giallorenzo, or Clepper and who complained of "racism, fabrication, mishandling or planting of evidence, falsification of police reports or false arrest" or manufacturing probable cause.

In support of the *Pitchess* motion, defense counsel's declaration stated that on September 17, 2006, defendant believed he was being waved through the accident scene. As he drove through the scene, an officer became irate and either hit the side of defendant's vehicle or threw something at it, frightening defendant and leading him to believe the officers intended to cause him physical harm. When officers initiated pursuit, defendant decided to drive to the Lake Elsinore police station "to find safe haven." At the *Pitchess* hearing, defense counsel further stated that defendant was also placed in fear by an officer drawing a gun on him. Defendant denied driving recklessly to the police station, and asserted that the officer's statements about his driving were false.

According to the declaration, when defendant arrived at the Lake Elsinore police station, he discovered the doors were locked. He turned to Deputies Quesada and

Giallorenzo and asked to see the watch commander. Defendant denied he resisted being handcuffed. He claimed that he was "beaten simply for asking questions," that Deputy Quesada falsified his police report and perjured himself at the preliminary hearing to conceal his "misconduct and malfeasance," and that the other officers "conspired with [Deputy] Quesada to support the misconduct in this matter."

Defendant offered a theory of self-defense in his *Pitchess* motion. He claimed he had good reason to flee to the Lake Elsinore police station because the officers intended to harm him. Although defendant is a White male, he argued, citing *Cadena v. Superior Court* (1978) 79 Cal.App.3d 212, 220, that racial bias was relevant because "'[evidence] of bigotry, as well as 'a proclivity for violence'" are material to a self-defense argument.

Defendant stated in his *Pitchess* motion that the officers conspired together to "grossly" exaggerate the facts of the chase and arrest, and thus brought their truthful character into issue. Defendant claimed the requested information was material and relevant to the credibility of the officers and was necessary to establish evidence of the officers' propensities for the types of misconduct asserted by the defendant.

At the hearing on the *Pitchess* motion, the trial court implicitly found defendant's factual account was internally consistent when it initially granted the motion as to Officer Quesada regarding the alleged excessive force.[5] The trial court did not appear to address defendant's contentions regarding falsification of police reports or fabrication of charges.

[5] The trial court changed its mind, denying the motion because any excessive force took place after the chase.

B. *Pitchess* Standard

A trial court's ruling on a *Pitchess* motion is based on the trial court's sound discretion and is reviewable for abuse. (*Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1039; *Pitchess v. Superior Court*, *supra*, 11 Cal.3d at p. 535.)[6]

"On a showing of good cause a criminal defendant is entitled to discovery of relevant . . . information" contained in the personnel records of police officers the defendant has accused of misconduct. (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1016 (*Warrick*).) To show good cause, the defendant must show that the information sought is material to the subject matter of the pending litigation, and that there is a reasonable belief the agency is in possession of such information. (*Ibid*.) This showing is "measured by 'relatively relaxed standards'" that insure trial court review of "'all potentially relevant documents.'" (*Ibid*.)

The supporting affidavit must state a defense to the pending charges. (*Garcia v. Superior Court* (2007) 42 Cal.4th 63, 71 (*Garcia*).) To show materiality, the defendant must establish a logical link between the proposed defense and the pending charge, and show how the discovery would support the defense or impeach the officer's version of events. (*Ibid*.) The affidavit must also describe a factual scenario that supports the

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[6] Although defendant contends this case may be reviewed de novo on appeal, the People correctly point out that the cases defendant cites for this proposition do not apply here. *City of El Cajon v. El Cajon Police Officers' Assn.* (1996) 49 Cal.App.4th 64 applies de novo review to the interpretation of a labor contract. (*Id*. at p. 70.) *Cho v. Superior Court* (1995) 39 Cal.App.4th 113 is a first impression case regarding a writ proceeding on a motion to disqualify a law firm. (*Id*. at p. 119.)

defendant's claim of misconduct. (*Ibid*.) Depending on the circumstances of the case, a denial of the facts asserted in the police report may be sufficient. (*Ibid.*)

The defendant does not need to corroborate or show motivation for the alleged officer misconduct, but must provide "'a plausible scenario . . . that might or could have occurred.' [Citation.] A scenario is plausible when it asserts specific misconduct that is both internally consistent and supports the proposed defense. [Citation.]" (*Garcia*, *supra*, 42 Cal.4th at p. 71.) The scenario does not need to be "reasonably probable or apparently credible." (*Warrick*, *supra*, 35 Cal.4th at pp. 1025-1026.) "To require a criminal defendant to present a *credible* or *believable* factual account of, or a motive for, police misconduct suggests that the trial court's task in assessing a *Pitches*s motion is to weigh or assess the evidence. It is not." (*Warrick*, *supra*, at p. 1026.)

"The information sought must be described with some specificity" to limit the defendant's request to "'instances of officer misconduct related to the misconduct asserted by the defendant.' [Citation.]" (*Garcia*, *supra*, 42 Cal.4th at p. 71.)

C. Defendant Showed Good Cause

Again, the required showing of good cause "is measured by 'relatively relaxed standards.'" (*Warrick*, *supra*, 35 Cal.4th at p. 1016.) Defendant provided a specific factual scenario that proposed a valid defense to his charge. The People argue that defendant "failed to provide an alternate version of the facts regarding the pursuit" and "failed to contradict, or even address, any of the facts related to the charge of recklessly evading" the deputies. We disagree.

Defendant's account of the facts differs from that of the police report on the instigation of the chase. Defendant believed he was being waved through a traffic block. This explains defendant's entrance into the accident scene. According to the police, defendant drove erratically and "raced" past officers at approximately 60 miles per hour, while at least two officers attempted to stop him.

Defendant claimed that because an officer became irate and struck his vehicle, putting him (defendant) in fear of his safety, he chose not to stop when the officers initiated pursuit. Defendant alleged that the officers pulled guns on him, further explaining his perceived need to reach a "safe haven." Although defendant did not explain why the officer became irate in defendant's description of the events, defendant is not required to provide motivation for the alleged conduct of the officers. (*Garcia, supra*, 42 Cal.4th at p. 71.)

Defense counsel's declaration stated that Deputy Quesada's report listed a number of traffic violations defendant had made. Defendant denied Deputy Quesada's charge, claiming that Deputy Quesada fabricated this information and exaggerated the details of the chase. While defendant did not specifically address the police allegations regarding his driving, in some cases a simple denial of the facts asserted in the police report may be sufficient. (*Garcia, supra*, 42 Cal.4th at p. 71.)

Defendant's factual scenario provides a defense to the charge. First, defendant did not intend to evade arrest, only to reach a safe place to submit himself to the authorities. Evading arrest is a specific intent crime. (See CALCRIM No. 2181.) Defendant's claim

could have negated the required specific intent. Second, defendant denied driving in the manner claimed by the officers. This is a defense to the reckless driving element of the crime. These defenses were enough to warrant an in camera hearing to review the officers' files for relevant information. (See *People v. Hustead* (1999) 74 Cal.App.4th 410, 416-417 (*Hustead*).)

In *Hustead*, a defendant charged with felony evasion of arrest following a high-speed chase sought *Pitchess* discovery regarding the pursuing officer's "history of misstating or fabricating facts" in police reports. (*Hustead*, *supra*, 74 Cal.App.4th at p. 416.) The defense counsel's declaration denied that the defendant had driven in the way or along the route described by the officer. (*Id.* at p. 417.) The *Hustead* court concluded the defendant both met his burden of showing materiality and established a plausible factual scenario showing he did not drive as described in the police report and the report was untrue. (*Id.* at pp. 416-417.)

The People rely on *People v. Thompson* (2006) 141 Cal.App.4th 1312 (*Thompson*) for the proposition that defendant failed to show good cause for the *Pitchess* motion. In *Thompson*, the defendant was charged with selling cocaine base to an undercover officer during a drug transaction operation involving 11 officers. (*Id.* at pp. 1314-1315, 1318.) The defendant filed a *Pitchess* motion seeking identification of all persons who filed or were interviewed about complaints against any of the officers concerning various forms of misconduct. (*Thompson*, *supra*, at p. 1317.) Defense counsel's declaration denied any "buy money" was recovered from the defendant and denied the defendant offered or sold

drugs to the undercover officer. (*Ibid*.) The defendant claimed the officers arrested him "'because he was in an area where they were doing arrests.'" (*Ibid*.) Once the officers realized the defendant had a prior criminal history, they "fabricated" the case against him, attributing narcotics already in their possession to him. (*Ibid*.) The defendant claimed the charges were fabricated to avoid liability for mishandling the situation, "'and to punish the defendant for being in the wrong area, at the wrong time and for having a prior criminal history . . . .'" (*Ibid*.)

The *Thompson* court found the defendant failed to show good cause under *Warrick*. According to *Thompson*, the *Warrick* defendant "did not merely make bald assertions that denied the elements of the charged crime. He provided an alternate version of the events that was plausible, if not entirely convincing," and presented a "'specific factual scenario' that explained his presence in the area, his running from the police, and a reason for the police to conclude that he had discarded the rock cocaine they recovered." (*Thompson*, *supra*, 141 Cal.App.4th at p. 1318.)

The *Thompson* court held that the defendant's attempt to demonstrate good cause was "insufficient" because it was not "internally consistent or complete." (*Thompson*, *supra*, 141 Cal.App.4th at p. 1317.) The court explained that it rejected the defendant's explanation because it failed to provide an account of the scope of alleged police misconduct or to adequately explain the defendant's own conduct in a way that supported his defense; not because it lacked credibility. (*Ibid*.) Specifically, the defendant failed to "state a nonculpable explanation for his presence in an area where drugs were being sold,

sufficiently present a factual basis for being singled out by the police, or assert any 'mishandling of the situation' prior to his detention and arrest." (*Ibid*.)

The People argue that defendant, like *Thompson*, failed to present a sufficient factual account. We disagree. As explained above, defendant's account provided a full, nonculpable explanation for his conduct, laid out the scope of alleged officer misconduct,[7] and provided a valid defense to the charges. Unlike the *Thompson* defendant, here defendant provided an alternate version of the facts which, while sparse in detail, adequately presented a plausible, if not probable, chain of events.

Further, *Thompson* distinguished itself from cases like this one. (*Thompson*, *supra*, 141 Cal.App.4th at pp.1318.) The *Thompson* court was asked to believe that 11 police officers conspired *in advance* to plant narcotics and recorded money on the defendant and fabricate all the events preceding and following his arrest "because he was standing at a particular location." (*Ibid*.) "Thompson [was] not asserting that officers planted evidence and falsified a police report. . . . The officers were not called upon to exaggerate or forget certain facts, or make assertions based on assumptions and inferences. The officers agreed to completely misrepresent what they saw and heard as percipient witnesses." (*Ibid*.) The *Thompson* court rejected this scenario because "*Warrick* permits courts to apply common sense in determining what is plausible, and to

[7] Specifically, defendant contended in his *Pitchess* motion that Deputy Quesada falsified his police report and perjured himself on the stand at the preliminary hearing, and the other officers conspired to permit Deputy Quesada to do so.

make determinations based on a reasonable and realistic assessment of the facts and allegations." (*Id.* at pp. 1318-1319.)

The People appear to argue that defendant must address every point in the police report to show good cause. However, no specific point-by-point denial is necessary. "[T]he requisite showing in a criminal matter 'may be satisfied by general allegations which establish some cause for discovery' other than a mere desire for all information in the possession of the prosecution. [Citation.]" (*City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 85.)

Therefore, we find defendant showed good cause and the trial court erred in denying an in camera review of the officers' files. (See *Hustead, supra,* 74 Cal.App.4th at pp. 416-417.)[8]

D. Harmless Error

Any error in denying defendant's *Pitchess* motion is subject to harmless error analysis. (See *People v. Memro* (1985) 38 Cal.3d 658, 684 (disapproved on other grounds as stated in *People v. Gaines* (2009) 46 Cal.4th 172, 181, fn. 2.) To establish defendant was prejudiced, we "determine if there was a reasonable probability that the outcome of the case would have been different had the information been disclosed to the defense." (*Hustead, supra,* 74 Cal.App.4th at p. 422.)

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[8] Although we agree with the People that defendant's *Pitchess* motion was overbroad, since we find that the trial court's error was harmless, we need not address this issue.

The People's case rested on the testimony and credibility of the officers. Defendant was not prejudiced if there were no relevant complaints against the officers. If there were relevant complaints, and if those complaints led to admissible evidence, that evidence might have influenced the jury's opinion of the officers' credibility. At best, the jurors might have disregarded the testimony of all prosecution witnesses and defendant would have been prejudiced. Not knowing the results of a potential in camera review, it is difficult to determine whether the denial of the *Pitchess* motion was harmless. Typically we would remand this matter to the trial court to conduct an in camera review of the officers' files. (See *People v. Gaines, supra,* 46 Cal.4th at pp. 180-181.)

However, the circumstances of this case are unique. The only evidence the People offered against defendant was the testimonies of the four police officers. If the testimonies of all four officers were completely discredited and ignored by the jury, the People would have failed to meet their burden of proof. The defendant could have chosen not to testify, and the case would have come out in defendant's favor. Thus, defendant urges us to send the case back for an in camera review of the personnel records. However, we cannot ignore defendant's testimony at trial. Even though the trial court erred in denying defendant's *Pitchess* motion, such error is harmless in light of the admissions made by defendant at trial. (See *People v. Samuels* (2005) 36 Cal.4th 96, 110 (*Samuels*) [denial of *Pitchess* motion harmless error where "extensive evidence" links defendant to crime].)

Defendant argues that the approach in *Samuels* proposes a less stringent test than the standard outlined in *People v. Watson* (1956) 46 Cal.2d 818. We disagree. *Watson* instructs the court to look at all the evidence and evaluate whether or not there was a probability of a more positive outcome if the error had not been made. (*Id*. at pp. 836-837.) Where "extensive evidence" links a defendant to a crime, it is unlikely that a more positive outcome would occur. (See *Samuels*, *supra*, 36 Cal.4th at p. 110.) Thus there is no material difference between the two tests.

1. Use of Defendant's Testimony

The People argue that any error in denying defendant's *Pitchess* motion was harmless because defendant essentially admitted all of the elements of reckless evasion on the stand.

A defendant's trial testimony is admissible at a later proceeding. (*Harrison v. U.S.* (1968) 392 U.S. 219, 222 (*Harrison*); Evid. Code §§ 1220, 1291.) "A defendant who chooses to testify waives his privilege against compulsory self-incrimination with respect to the testimony he gives, and that waiver is no less effective or complete because the defendant may have been motivated to take the witness stand in the first place only by reason of the strength of the lawful evidence adduced against him." (*Harrison*, *supra*, at p. 222; see also *People v. O'Connell* (1984) 152 Cal.App.3d 548, 553.)

In his reply brief, defendant argues he should receive a new trial because "[a]bsent the trial court's error, this Court does not know what an in camera hearing would have revealed—or if [defendant] would have even testified—and therefore cannot judge what

result would have occurred." This raises the question whether "there was a reasonable probability that the outcome of the case *would* have been different had the information been disclosed to the defense." (*Hustead, supra,* 74 Cal.App.4th at p. 422, italics added.)

We have found no cases answering the question of how to handle defense testimony given as a result of a trial court's error in denying *Pitchess* discovery. Therefore, we look to cases involving the testimony of defendant given as a result of trial court error in admitting evidence in violation of *Miranda*.[9]

In the *Miranda* context, if the defendant can show that he would not have testified had the error not been made, the prior testimony may be suppressed if it is otherwise suspect. (*Harrison*, *supra*, 392 U.S. at pp. 223-226.) In *Harrison*, prior testimony of the defendant was read into evidence over the defendant's objection that he had testified at the former trial only because inadmissible confessions had been introduced. (*Id.* at p. 221.) The *Harrison* court found that the trial testimony had been tainted by the same illegality that had rendered the confessions inadmissible and reversed. (*Id.* at pp. 223-226.) *Harrison* turned on the fact that defense counsel argued during the opening statement that defendant would not testify, a decision that changed after the admission of the confessions. (*Id*. at pp. 225-226.)

There must be an indication in the trial record that the defendant would not have testified before a court will hold prior testimony to be tainted, and therefore inadmissible in a later trial. (*People v. Bradford* (2008) 169 Cal.App.4th 843, 855-856 (*Bradford*).)

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[9] *Miranda v. Arizona* (1966) 384 U.S. 436.

The *Bradford* court determined that the testimony of the defendant should be considered in the harmless error analysis even though the defendant claimed the testimony was given in light of an improperly admitted confession. (*Id*. at p. 855.) The court decided that, where there was no evidence in the record that defendant did not plan to testify, it would not speculate whether defendant would have testified in the absence of the need to respond to his confession. (*Ibid*.) The court reasoned this would "require[] us to engage in speculation about the parties' tactical choices." (*Ibid*.) Therefore, since "it is impossible to determine what might have happened had the trial proceeded differently, we conclude that prejudice should be evaluated on the basis of the evidence actually presented, while excluding the improperly admitted confession." (*Ibid*.)

Here defendant's testimony would be admissible at any subsequent trial, because he took the stand to testify on his own behalf, and he failed to provide adequate proof that he would not have testified at trial. Defendant's argument that he *might not* have testified at trial is plainly insufficient to prevent the use of the testimony at any further proceeding that might take place. Because there was no evidence on the record that defendant would not have testified but for the lack of *Pitchess* information and any future proceedings would include the defense testimony, we consider the contents of defendant's testimony in our harmless error analysis. (See *Bradford*, *supra*, 169 Cal.App.4th at pp. 855-856; *People v. Lujan* (2001) 92 Cal.App.4th 1389, 1403-1404.)

2. Defendant's Admissions

The jury was instructed that the People must prove: (1) defendant was being pursued by a police officer driving a motor vehicle; (2) defendant willfully fled from or tried to elude police while driving a motor vehicle, "intending to evade the officer"; (3) "defendant drove with willful or wanton disregard for the safety of persons or property" during the pursuit; and (4) the police officer's vehicle was clearly identifiable and the police were in uniform. (CALCRIM No. 2181.)

In his closing remarks, defense counsel expressly conceded that the first and fourth elements were met. In his testimony, defendant essentially conceded these points.

Although defendant expressly admitted he drove away from the officers knowing they were pursuing him, he did not expressly admit an intent to evade them. However, his admissions provided ample evidence for the jury to conclude that he intended to evade the officers for at least the early portion of the chase. Defendant testified, "Except for those officers that had acted that way, my intent was not to escape the authorities of the law." Defendant claimed he was simply attempting to "get to a place of safety." But defendant admitted he was not initially attempting to drive to the Lake Elsinore police station but rather to the airport where his friends were located.

Defendant asserted two of the officers' actions caused him to fear for his safety. First, he claimed that while he was driving through the accident scene, Deputy Clepper threw a foreign object at the defendant's car, shouting a profanity at defendant. Deputy Clepper admitted throwing his pen at defendant's car and shouting at defendant, but the

deputy was not asked, nor did he testify, whether he used profanity. In the *Pitchess* motion, defendant claimed he was "immediately placed in fear for his safety" after his clash with Deputy Clepper. However, during his testimony, defendant contradicted this statement by stating he was not initially afraid but rather was "nervous because of what [he (defendant) had] done."

Second, defendant stated that when he stopped on the side of the road, Deputy Quesada pulled a gun on him and was "leering" at him. Deputy Quesada testified that he did indeed pull a gun on defendant while defendant was stopped at a red light. Deputy Quesada did not testify that he gave any orders to defendant, nor did the deputy testify as to what his facial expression at the time might have conveyed.

The primary differences between the testimonies of defendant and the officers regarded what statements were or were not made, and the demeanor of the parties. However, defense counsel pointed out the substantial differences between the statements of the various officers in his closing arguments. Considering the disparate nature of the officers' testimonies regarding what, if anything, was said during the chase, it is unlikely that impeachment evidence would have altered the jury's impression of whether these statements were actually made. Rather, given the similarities in the testimonies provided by defendant and the officers, as well as defendant's admission that he was attempting to initially flee to the airport, it is likely the jury would have found intent to evade even if they disregarded the officers' testimonies.

Regarding the issue of whether or not defendant was driving in the manner the police claimed, defendant disagreed with the testimonies of the officers that he heard them order him to stop while driving through the accident scene. Because the credibility of the officers relates more clearly to this issue, we will not consider possible traffic violations or descriptions of defendant's driving until after defendant left the traffic scene and acknowledged that he was being pursued by the officers.

Defendant admitted he potentially went through a red light. He admitted that he was aware of the possible risks of running a red light, stating that he "was as cautious as [he] could be in the circumstances." Although defendant argues this shows he was driving carefully, we disagree. The statement that defendant was "as cautious as [he] could be in the circumstances" is an admission that defendant was aware of the risk his actions posed and proceeded in spite of those risks. Defendant additionally acknowledged making an illegal U-turn.

The issue of defendant's speed is more difficult to assess. The officers provided a highly disparate testimony on the rates of speed they believed the defendant to be traveling, with estimates ranging from 40 to 80 miles per hour. Further, defendant provided evidence that his truck could travel only 60 to 65 miles per hour downhill, and 35 to 40 miles per hour uphill. The relevant speed limit on defendant's path was 45 to 50 miles per hour. However, even assuming that defendant was not speeding, his admissions that he was aware of the risk of driving through red lights and making illegal U-turns and that he took those actions anyway are sufficient to find the defendant drove

with "willful or wanton disregard for the safety of persons or property." (Veh. Code, § 2800.2.)

These admissions show good cause for the officers' pursuit, that defendant evaded pursuing police officers, and that defendant willfully disregarded the safety of persons or property. Even if there was useful information in the police records, the defendant already has conceded that he committed the elements of the charged offense in his own testimony.

For this reason and the reasons stated above, we find that the trial court's error in denying defendant's *Pitchess* motion was harmless.

IV. JURY INSTRUCTIONS

Defendant contends CALCRIM Nos. 226 and 302 are unconstitutionally vague and prejudicially misrepresent the prosecution's burden of proof.

The jury was instructed with CALCRIM No. 226 in pertinent part as follows:

"You alone must judge the credibility or believability of the witnesses. In deciding whether testimony is true and accurate, use your common sense and experience. The testimony of each witness must be judged by the same standard. You must set aside any bias or prejudice you may have, including any based on the witness's gender, race, religion, or national origin. **You may believe all, part, or none of any witness's testimony. Consider the testimony of each witness and decide how much of it you believe**. [¶] . . . [¶]

"Do not automatically reject testimony just because of inconsistencies or conflicts. Consider whether the differences are important or not. People sometimes honestly forget things or make mistakes about what they remember. Also, two people may witness the same event yet see or hear it differently." (Bolding added.)

The jury was also instructed with CALCRIM No. 302 as follows: "If you determine there is a conflict in the evidence, **you must decide what evidence, if any, to believe**. Do not simply count the number of witnesses who agree or disagree on a point and accept the testimony of the greater number of witnesses. On the other hand, do not disregard the testimony of the greater number of witnesses, or any witness, without a reason or because of prejudice or a desire to favor one side or the other. What is important is whether the testimony or any other evidence convinces you, not just the number of witnesses who testify about a certain point." (Bolding added.)

Defendant contends the wording set forth in bold, *ante*, misrepresented the prosecution's burden of proof and was unconstitutionally ambiguous. He asserts that instructing a jury it must decide what testimony to "believe" tells the jury it must "disregard evidence it does not 'believe,' even though that evidence may carry enough evidentiary weight to provide reasonable doubt." He claims this discarding of evidence unconstitutionally shifts the prosecution's burden of proof beyond a reasonable doubt, because it requires the defendant to provide believable exculpatory evidence when a defendant is required only to point to the existence of a reasonable doubt, which "may be done without presenting any evidence whatsoever." According to defendant, "[t]he jury

instructions given here were unconstitutionally ambiguous because there is a reasonable likelihood that [the] jury applied them in a way which caused them to disregard exculpatory evidence." Thus, he argues, "Had the jury been instructed it could consider evidence it did not believe, there is a reasonable chance that it would have acquitted [defendant]."

A. Forfeiture

The People first contend defendant forfeited these challenges by failing to object to those instructions in the trial court.[10] Defendant acknowledges his failure to object.

Failing "to request clarification of an instruction that is otherwise a correct statement of law forfeits an appellate claim of error based upon the instruction given. [Citations.]" (*People v. Rundle* (2008) 43 Cal.4th 76, 151 (disapproved on other grounds as stated in *People v. Doolin* (2009) 45 Cal.4th 390, 421).) However, defendant claims CALCRIM Nos. 226 and 302 were not correct statements of law and negatively impacted his due process rights. Thus, we review defendant's claim of instructional error. (Pen. Code, §1259.)

B. Standard of Review

The standard of review for jury instructions is de novo. (*People v. Posey* (2004) 32 Cal.4th 193, 218.) Instructions must be viewed "as a whole, in light of one another," without singling out a word or phrase. (*People v. Holmes* (2007) 153 Cal.App.4th 539,

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[10] The People additionally point out that defense counsel specifically stated on the record that he had no objections to the jury instructions.

545-546.) We "'"assume the jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given."' [Citation.]" (*Id*. at p. 546.) An instruction is only "ambiguous or misleading if, in the context of the entire charge, there is a reasonable likelihood that the jury misconstrued or misapplied its words. [Citation.]" (*People v. Campos* (2007) 156 Cal.App.4th 1228, 1237.) The arguments of counsel must also be considered in "assessing the probable impact of the instruction on the jury. [Citation.]" (*People v. Young* (2005) 34 Cal.4th 1149, 1202.)

C. Challenged Portions of CALCRIM Nos. 226 and 302

The jury has the "unquestioned role as the determiner of factual issues." (*Jones v. United States* (1999) 526 U.S. 227, 247 fn. 8.) Where there is conflicting evidence, the process of reaching a verdict "necessarily entails rejection of some evidence in favor of other evidence." (*People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 885 (*Rincon-Pineda*).)

CALCRIM No. 226 instructs the jury on the factors relevant to a witness's credibility. (CALCRIM No. 226; see *Rincon-Pineda, supra*, 14 Cal.3d at pp. 883-884 [discussing CALJIC No. 2.20, which preceded CALCRIM No. 226].) Although defendant focuses on the word "believe" in the instruction, looking at the instruction as a whole, it is clear that "believe" is intended to signify credibility. (CALCRIM No. 226 ["[y]ou alone must judge the credibility or believability of the witnesses"].) CALCRIM No. 226 does not address how the prosecution's burden of proof is to be met and has been held to apply only to the assessment of a witness's credibility, not to the finding of reasonable doubt. (*People v. Campos, supra*, 156 Cal.App.4th at p. 1240.)

Regarding defendant's claim that CALCRIM No. 226 requires the jury to disregard exculpatory testimony because only one side can be believed, we note that CALCRIM No. 226 instructs the jury not to "automatically reject testimony just because of inconsistencies or conflicts." (CALCRIM No. 226.) In *People v. Carey* (2007) 41 Cal.4th 109, the court rejected the argument that instructing the jury to decide what testimony to believe where there were conflicting accounts lessened the prosecution's burden of proof. (*Id*. at p. 130.) Permitting a jury to assess a witness's testimony under a "probability of truth" standard does not affect the defendant's burden of proof. (*Id.* at pp. 130-131; *People v. Maury* (2003) 30 Cal.4th 342, 428-249.) *Maury* found that asking the jury to weigh the convincing force of evidence was only "'"part of the process of determining whether the prosecution had met its fundamental burden of proving [defendant's] guilt beyond a reasonable doubt . . . ."' [Citations.]" (*Maury, supra*, at p. 429.)

Contrary to defendant's contention that the jury is forced to select whether it believes the People's theory or defendant's theory, the jury always has the option of disregarding all testimony provided and believe neither theory. (CALCRIM No. 226 [the jury "may believe all, part, or none of any witness's testimony"].)

CALCRIM No. 302 instructs jurors on evaluating conflicting evidence. (CALCRIM No. 302; see *Rincon-Pineda, supra*, 14 Cal.3d at p. 884, 884 fn. 8 [discussing CALJIC 2.22, which preceded CALCRIM No. 302].) In his argument against CALCRIM No. 302, defendant takes the word "believe" out of context to claim this

places the burden of pointing to believable exculpatory evidence on defendant, thereby undermining the presumption of innocence.

Defendant has distorted the meaning of the phrase "decide what evidence, if any, to believe." (CALCRIM No. 302.) CALCRIM No. 302 plainly and correctly instructs the jurors that when they are presented with conflicting evidence, they must decide what evidence, "if any," to believe. (CALCRIM No. 302.) The phrase "if any" indicates the jury is *not* required to believe exculpatory evidence presented by the defendant to find reasonable doubt. (CALCRIM No. 302.)

Defendant's interpretation of CALCRIM No. 302 appears to imply that the jury is required to believe one side or the other. But the instruction clearly states the jury has the option to believe neither side. (CALCRIM No. 302.) Nothing in CALCRIM No. 302 tells the jury to "disregard the prosecution's burden of proof or to decide the case on the basis of disbelief of defense witnesses or presentation of more compelling evidence by the prosecution than by the defense. [Citation.]" (*People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1191.) Instructing the jury to "determine each factual issue in the case by deciding which witnesses were most convincing," does not lower the People's burden of proof. (*People v. Carey, supra*, 41 Cal.4th at p. 131.) Nor does CALCRIM No. 302 create any presumption of credibility for prosecution witnesses; it "merely cautions the jurors not to disregard testimony on a whim." (*People v. Anderson* (2007) 152 Cal.App.4th 919, 939.)

The trial court clearly and correctly instructed the jury on the presumption of innocence and burden of proof. The jury was repeatedly told that defendant was presumed innocent and that the prosecution bore the burden of proving his guilt beyond a reasonable doubt. (See CALCRIM Nos. 100 [trial process], 103 [reasonable doubt (pre-trial)], 220 [reasonable doubt (post-trial)].) Looking at CALCRIM Nos. 226 and 302 as a whole and in conjunction with the instructions given regarding the prosecution's burden of proof, we see nothing to support the defendant's contention that the jury may have interpreted these instructions in an unconstitutional manner. Nor was anything said in the closing arguments that could have led the jury to apply these instructions unconstitutionally.

Thus, we do not find any ambiguity in the challenged language of CALCRIM Nos. 226 and 302, nor do we find there is any reason to believe the jury would have interpreted these instructions in an unconstitutional manner.

V. DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

HOLLENHORST
Acting P. J.

We concur:

MCKINSTER
J.

RICHLI
J.